

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0259
Sales and Use Tax
For the Tax Year's 1999-2000**

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ISSUES

I. Sales and Use Tax-Imposition of Use Tax

Authority: IC 6-8.1-5-1 (b), IC 6-2.5-3-2, IC 6-8.1-5-4(a), 45 IAC 2.2-4-22(d).

The taxpayer protests the imposition of use tax on property purchased pursuant to time and materials contracts.

II. Tax Administration- Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2.

The taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

The taxpayer is a real estate corporation. During the audit period, the taxpayer had homes built on property it owned. The taxpayer later sold these homes. A contractor, who billed the taxpayer on a time and materials basis, failed to collect sales tax on the materials used in many of the homes built for the taxpayer. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty for the tax years 1999 and 2000. The taxpayer protested the assessment of tax on the materials the taxpayer purchased pursuant to the time and materials contracts and penalty. A telephone hearing was held and this Letter of Findings results.

I. Sales and Use Tax-Imposition of Tax

DISCUSSION

Indiana imposes an excise tax, the use tax, on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of purchase. IC 6-2.5-3-2.

The responsibility for payment of gross retail (sales and use) tax in situations where a contractor is installing tangible personal property on real estate owned by another is set out at 45 IAC 2.2-4-22(d) as follows:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

- (1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction materials and the cost for the labor and other charges (only the gross proceeds from the sale of the construction material are subject to tax);

Clearly, pursuant to the cited Regulation, the contractor should have collected sales tax from the taxpayer and remitted that sales tax to the state. All parties agree that the contractor did not collect and remit the sales tax on the protested items. Therefore, since the taxpayer used the construction materials in Indiana and did not pay sales tax at the time of purchase, the taxpayer owes tax on the use of those construction materials.

Pursuant to IC 6-8.1-5-1 (b), all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-4(a) requires the taxpayer to “keep books and records so that the department can determine the amount, if any, of the person’s liability for that tax by reviewing those books and records.”

The taxpayer and audit indicate that during 1999, the contractor was also in the building supply business. The taxpayer contends that it does not owe the assessed use tax on materials used during the period the contractor was in the building supply business, the contractor collected sales tax and remitted it to the state. The contractor was not, however, registered with the state as a retail merchant. There is no evidence that the contractor ever remitted the allegedly collected sales tax to the state.

The taxpayer contends that after the contractor closed its building supply business, the contractor passed the cost of the building supplies through to the taxpayer. In these cases, the taxpayer contends that the contractor paid sales tax on the supplies at the time of purchase. There were not, however, adequate books and records to indicate that the contractor stopped marking up the cost of the materials. Further, the audit determined that the contractor did not always pay sales tax on building supplies at the time of purchase.

The audit indicates that the contractor was given credit for sales taxes it paid on building materials used in the taxpayer’s situation. The protested assessment properly assesses the use tax against the taxpayer.

FINDING

The taxpayer’s protest is denied.

II. Tax Administration- Penalty

DISCUSSION

The taxpayer also protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer contends that it did not know the contractor should have been collecting sales tax on the sales of construction supplies pursuant to the time and materials contracts. However, earlier in the relationship between the taxpayer and the contractor, the contractor was collecting sales tax. Since there was no change in the transaction, it was negligent that the taxpayer did not realize it should continue to pay the sales tax to the contractor.

FINDING

The taxpayer's protest is denied.